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Faculty of Law

CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS IN THE BRICS COUNTRIES

by

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1. INTRODUCTION

Formed in 2010, BRICS is an acronym for the economic bloc comprising Brazil, Russia, India, China and South Africa.[1] Its predecessor was the BRIC group, comprising Brazil, Russia, India and China.[2] The original BRIC organisation was birthed in 2001, as part of an economic modelling exercise undertaken by Goldman Sachs to forecast global economic trends.[3] Goldman Sachs former chairperson Jim O'Neil, in the course of that modelling exercise, coined the "BRIC" acronym and predicted that the BRIC countries would overtake the United States of America and other G-7 countries in the near future.[4] In 2010, the BRIC group agreed to invite South Africa to join the organisation and on 14 April 2011, South Africa attended the first joint summit, which saw BRIC formally evolve into BRICS.[5] The BRICS organisation is regarded as a coalition of leading emerging nations who are dominating the international stage for both economic and political reasons.[6]

The BRICS countries occupy over 25% of the world's total land coverage, account for 40% of the world's population and hold a combined GDP of approximately 20 trillion dollars.[7] They also account for at least 15% of world trade and two-fifths of the world's foreign currency reserves.[8] The principles that underpin BRICS are captured in the declarations of the Heads of State Summit and summarized in the Five Pillars of the BRICS Long Term Strategy endorsed by the Heads of State in a summit at Fortaleza (Brazil) in July 2014.[9] One of these pillars is the need for economic cooperation.[10] In addition, BRICS has also established a Business Council whose objectives include the promotion and strengthening of business, trade and investment ties amongst the business communities of the five BRICS countries.[11] It goes without saying that the BRICS group is desirous of achieving greater cooperation in the area of commerce.

[1] Koba "BRICS; CNBC explains" (https://www.cnbc.com/id/44006382 (11-08-2019)).
[2] See Koba (n 1) and Masuku "Origin and evolution of BRICS [Brazil, Russia, India, China and South Africa]" (http://www.brics5.co.za/about-brics/ (11-08-2019)).
[3] See Masuku (n 2) and Dersola, Leal, Cavalcante, Schmidt and Braga "Intellectual property and trademark legal framework in BRICS countries: A comparative study" World Patent Information 2017 1.
[4] See Koba (n 1) and Bouwers (2013) the law applicable to an international contract of sale in the absence of a choice of law – a comparative study of Brazilian, Russian, Indian, Chinese and South African Private International Law, 2 LLM (International Commercial Law) [Unpublished] University of Johannesburg, retrieved from (https://ujdigispace.uj.ac.za (25-06-19)).
[5] See Bouwers (n 4) 2.
[6] Shishana, Mothiane and Josie "The evolution of the BRICS, perspectives for enlargement" HSRC (2015) 1.
[7] See Koba (n 1); Bidwai "BRICS: a loosely held group with little sense of purpose" (https://www.tni.org/en/article/brics-little-sense-of-purpose(05-08-2019));
(http://worldpopulationreview.com/-countries/bric-countries/ (12-08-2019)).
[8] See (n 7) above.
[9] See Shishana et al (n 6) 3.
[10] See (n 7) above.
[11] See BRICS Business Council website (https://www.bricsbusinesscouncil.in/ (03-08-2019)).

Aspects relating to the contract are undoubtedly at the heart of all commerce. Goods and services are supplied pursuant to the terms of the contract made between businesspersons.[12] Irrespective of the nature of the transaction in international commerce, the fundamental question as to the validity, interpretation, enforceability and effectiveness of the contract entered into is: what law governs the contract? As Lord Diplock succinctly put it in *Amin Rasheed Shipping Corporation v Kuwait Insurance Company*,[13]

> "contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations."[14]

The current author is of the opinion that the much-desired objectives of economic trade and commercial cooperation can best be achieved with greater harmonisation in international commercial law. The field of international commercial law encompasses private international law (or the conflict of laws), which is the first point of departure in resolving multistate disputes. This study concerns itself with a subset of private international law called "choice of law". According to Symeonides: "Choice of law is a subdivision of 'Conflict of Laws' – namely, that branch of law that aspires to provide solutions to multistate legal disputes between persons or entities (other than states)."[15] It refers specifically to the method or process by which one determines which State's law will/should govern a multistate dispute.[16]

The aim of this paper is to illustrate and assess how the various BRICS countries handle the "choice of law" question in commercial litigation i.e. whether they allow for party autonomy; if they do, in what manner may the parties express their choice and what limitations (if any) apply to the parties' choice of law. In order to present a holistic view of the choice of law question, the paper shall also briefly discuss the approach adopted by each of these countries in determining the applicable law in the absence of choice. Finally, a comparison shall be made between the various countries to ascertain areas where harmonization is necessary.

[12] Sealy and Hooley *Commercial Law Text, Cases and Materials* (2009) 21.
[13] 1984 AC 1 50.
[14] *Amin Rasheed Shipping Corporation v Kuwait Insurance Company* 1984 AC 1 65.
[15] Symeonides *Choice of Law* (2016) 1. According to Symeonides, a dispute is multistate if one or more of its constituent elements relate to more than one state.
[16] Symeonides (n 15) 1 and Peari *The Foundation of Choice of Law Choice and Equality* (2018) xvi.

2. CHOICE OF LAW IN BRAZIL

2.1 *Introduction*

Brazil was a Portuguese colony until its independence in 1822.[17] Portuguese law, which is formalist and characterised by unilateral rules, was in force in the Brazilian territory for almost four centuries, until the Civil Code of 1916 was passed.[18] By then, the strong Portuguese heritage of continuity, formalism (i.e. strong influence of positivism and lex forism), centralism of powers and unity of the legal system had already been transplanted into the psyche of the Brazilian legal system.[19] This coupled with the size of its territory and the influx of immigrants, led Brazil to prioritise the application of the *lex fori*, thus predisposing Brazil to only sparsely applying foreign law.[20]

Brazil is also regarded as a member of the Pan American system of private international law, owing to its adherence to the Pan American Code of Private International Law (the Bustamante Code).[21] Although the Code is often cited in court decisions, it is difficult to assess its impact on Brazilian conflict of laws as there is no known Brazilian treatise dealing with the Bustamante Code, neither has it been studied or discussed to an appreciable extent in both academic and professional circles.[22]

Before the Bustamante Code was adopted in 1928, Brazil had already adopted conflict rules in the Introduction to the Civil Code of 1916, which was subsequently replaced by the 1942 Law of Introduction to the Civil Code, which is presently the basic source of private international law.[23]

2.2 *Party Autonomy in Brazil*

As mentioned above, the main source of Brazilian private international law is the Law of Introduction to the Civil Code of 1942 (LICC)[24] known since 2010, as the Introductory Law to the Brazilian Legal System (LINDB).[25] The LINDB provides the principles and rules

[17] See Garland *American-Brazilian Private International Law* (1959) 11 and Marques, Lixinski and Baquero "Brazil" *Encyclopaedia of Private International Law* (2017*)* 1928 and 1931.
[18] Marques, Lixinski and Baquero (n 17) 1931.
[19] Marques, Lixinski and Baquero (n 17) 1931.
[20] Marques, Lixinski and Baquero (n 17) 1931.
[21] Garland (n 17) 12; The Bustamante Code was adopted in Havana in 1928. Brazil signed, ratified and promulgated the Bustamante Code by Decree No. 18.871 of August 13, 1929.
[22] Garland (n 17) 19.
[23] Garland (n 17) 16.
[24] Decree Law No. 4.657 of 4 September 1942.
[25] Dolinger and Tiburcio *Private International Law in Brazil* (2017) 34.

governing the choice of the applicable law as well as rules on international jurisdiction.[26] Article 9 of the LINDB states:

> "In order to characterize and govern the obligations, the law of the state in which they are constituted shall apply. (1) In the event that the obligations shall be performed in Brazil and depending on an essential form, this one shall be observed, being admitted the peculiarities of the foreign law, as to the extrinsic requirements to the act. (2) The obligations arising from the contract is considered constituted at the place in which the proponent resides."

Article 9 of the LINDB does not appear to embrace the concept of party autonomy.[27] First, it provides that the applicable law to be applied in determining the obligations arising out of a contract shall be the law of the place where the contract was constituted (signed or entered into) i.e. the *lex loci contractus*.[28] This leaves no room for the parties to the contract to exercise any choice of law.[29] It appears that the only way in which parties to a contract may exercise a choice of law would be for them to ensure that their contract is constituted in a country whose law they wish to govern their agreement.

The second paragraph in article 9 contains a further proviso, namely that "the obligations arising from the contract is deemed to be constituted at the place in which the proponent resides".[30] The Organization of American States (OAS) views the term "proponent" to mean the offeror of a contract.[31] Thus, the *locus contractus* (in terms of article 9(2)) is presumed to be the place where the offeror in a contract resides.[32] In light of this, it appears that the law, which a Brazilian court would apply in determining the obligations arising out of a contract, is the law of the place of where the offeror resides (and not the actual *locus contractus*). However, Lima Marques *et al* assert that article 9(2) only applies to contracts *inter absentes*, and that it is in such situations that the offeror's residence will be deemed the place of constitution of the contract.[33]

Article 9 of the LINDB makes it clear that the law applicable to an international agreement is primarily, the law of the State in which it is constituted, regardless of whether the parties made

[26] Dolinger and Tiburcio (n 25) 34.
[27] See, also, the Organization of American States (OAS) Guide on Law Applicable to International Commercial Contracts in the Americas 61. (http://www.oas.org/es/sla/ddi/docs/Guide_Law_Applicable_International-_Commercial_Contracts_Americas_2019.pdf (1-10-2019)).
[28] See, also, Marques, Lixinski and Baquero (n 17) 1935 and the OAS Guide (n 27) 82.
[29] Albornoz "Choice of law in international contracts in Latin American legal systems" 2010 *Journal of Private International Law* 6, no. 1 23 44.
[30] Dolinger and Tiburcio (n 25) 241.
[31] See the OAS Guide (n 27) 82.
[32] See Faria "Another BRIC in the wall: Brazil joins the CISG" 2015 *Uniform Law Review* Vol. 20 211 212.
[33] Marques, Lixinski and Baquero (n 17) 1935.

a choice of law. Furthermore, if the contract is to be performed in Brazil, then Brazilian law shall apply.[34]

Notwithstanding the above, certain Brazilian scholars continue to advocate the validity of party autonomy in Brazilian law.[35] Valladao is of the opinion that article 9 may be interpreted in a manner that admits party autonomy, since the term "considered", used in article 9(2), appears with the term "repute-se" in the Portuguese translation, which connotes a presumption.[36] According to Valladao, the provision that the law of the place of the proponent should apply is merely a presumption, which will be valid only if the parties did not choose any legal system.[37] Gama bases his support for party autonomy on article 5(ii) of the 1988 Brazilian Constitution,[38] which states: "No one shall be obliged to do or refrain from doing something except by virtue of law." He argues that, in the absence of an express prohibition of party autonomy, such freedom does exist.[39] Furthermore, there are some isolated court decisions in which the court respected the parties' choice of law.[40] There have also been several attempts to introduce reforms to the LINDB in recent years. The current proposal to reform the LINDB includes a revised article 9, which permits party autonomy. However, the proposed Bill 4905 remains at an impasse in Congress.[41]

Although these developments point towards the possible acceptance of party autonomy in future, the current position remains that the LINDB does not embrace the concept. As such, parties to an international commercial contract would probably not have their choice of law clause upheld by a Brazilian court. As previously mentioned, in order to circumvent this, parties must ensure that their contract is constituted in a country whose law they desire to govern their contract.

[34] De Arajuo "Recent developments and current trends on Brazilian private international law concerning international contracts" *Panorama of Brazilian Law* Vol 1, No 1 (2013) 73 76; Bouwers (n 7) 7.
[35] Dolinger and Tiburcio (n 25) 80.
[36] De Arajuo (n 34) 78 and Dolinger and Tiburcio (n 25) 238.
[37] See Dolinger and Tiburcio (n 25) 239-240 for a detailed discussion in this regard.
[38] Available at (http://english.tse.jus.br/arquivos/federal-constitution (1-10-2019)).
[39] See De Arajuo (n 33) 78.
[40] See Dolinger and Tiburcio (n 25) 240 and Albornoz (n 29) 44.
[41] See the OAS Guide n (27) 54.

3. CHOICE OF LAW IN RUSSIA

3.1 *Introduction*

Russian private international law has been shaped by internal and external factors, such as changes in political structure, economic policy and global changes.[42] Russia underwent dramatic social shocks in the twentieth century. This transformed its geographic borders, political, economic and legal system.[43] In order to gain a better understanding of modern Russian private international law, it is useful to revisit Russian history of the twentieth century to retrace how its private international law has evolved.

Russia entered into the twentieth century as an empire under monarchical rule.[44] After the first Russian revolution of 1905, attempts were made to introduce reforms for the purpose of attaining political democratization and economic development.[45] That period was characterised by rapid economic growth and a boost in foreign trade, flowing from the development of market relations and private ownership as cornerstones of the economy.[46] These developments served as a springboard for Russian private international law. As early as 1991, several Russian scholars submitted a proposal for the formulation of a separate Act on private international law.[47] Although that project did not materialise, it emphasised the growing importance of the subject. At present, Russia's private international law has been incorporated into the Russian Federation Civil Code of 2002.[48]

3.2 *Party Autonomy in Russia*

The Russian private international law rules (and by extension, its choice of law rules) are found in section VI of the third part of the Civil Code of the Russian Federation, which entered into force on 1 March 2002.[49] The most relevant articles of the Russian Code, for purposes of this discussion, are articles 1210, 1211 and 1215.

Article 1210(1) of the Civil Code provides:

> "When they enter into a contract or later on the parties thereto may select by agreement between them the law that will govern their rights and duties under the contract. The law so selected by the

[42] Vorobieva *Private International Law in Russia* (2015) 15.
[43] Vorobieva (n 42) 15.
[44] Vorobieva (n 42) 15.
[45] Vorobieva (n 42) 15
[46] Vorobieva (n 42) 15.
[47] Lebedev, Muranov, Khodykin and Kabatova "New Russian legislation on private international law" *Yearbook of Private International Law* vol 4 (2002) 117-118.
[48] Civil Code of Russia (2001) (translation in 2002 *Yearbook of Private International Law* 349).
[49] Lebedev, Muranov, Khodykin and Kabatova (n 47) 117; Vorobieva (n 42) 21.

> parties shall govern the emergence and termination of a right of ownership and other rights in rem relating to movable property with no prejudice for the rights of third persons."

It is evident that Russian private international law recognises the concept of party autonomy as a fundamental principle in international commercial contracts.[50] It allows the parties to a contract to decide by agreement, which law should govern their contract. There is no requirement in respect of the form that the agreement should take. Therefore, it may be either a written or a verbal agreement. The Code is silent on whether the parties may choose a non-State law to govern the contract. However, there is no requirement that the chosen law must bear a connection to the contract or the parties. Article 1210(5) provides:

> "If it ensues from the group of circumstances of a case that were in existence as of the time of selection of applicable law that the contract is actually connected with only one country the parties' selection of the law of another country shall not affect the imperative norms of the country with which the contract is actually connected."

In light of the above, Russian authors are of the view that the law chosen by the parties need not have any connection to the contract or the parties; they may choose any legal system to govern their contractual relationship.[51] The only caveat is that, if at the time that the choice of law was made, the contract is manifestly connected with only one country, then the parties' choice of law shall not prejudice/prevent the application of the mandatory rules of the country with which the contract is connected.

Article 1210(3) of the Russian Civil Code provides that the "selection of applicable law made by parties after the conclusion of a contract shall have retroactive effect and it shall be deemed valid". This implies that the parties are at liberty to exercise their choice at any time, either at the formation, the conclusion of the contract or thereafter.[52] As such, the parties may even choose the applicable law at the time of litigation. A choice of law made in this manner, i.e. at a time after the conclusion of the contract, shall have retroactive effect and be deemed valid as if it were made at the time of conclusion of the contract, insofar as it does not prejudice the rights of third parties or prejudice its formal validity.[53]

Russian private international law also permits *dépeçage* (allowing parties to select the applicable law for the contract as a whole or for specific parts only), with the effect that

[50] See also, Lebedev et al (n 47) 130 and Vorobieva (n 42) 79.
[51] Lebedev et al (n 46) 130-131 and Vorobieva (n 41) 83.
[52] Orlov "Updated international private law of Russia" *Athens Journal of Law* Vol 3, Issue 2 (2017) 75 93.
[53] See article 1210(3) of the Russian Civil Code; Asokov "Russian Federation" in Basedow et al *Encyclopedia of Private International Law* Vol 3 (2017) 2451 2459; Orlov (n 52) 93 and Vorobieva (n 42) 82.

different legal systems may, in fact, govern different parts of the same contract.[54] These provisions illustrate that Russian law regards the parties' agreement on the choice of law as separate and independent from the contract itself.[55]

Regarding the manner of the parties' choice of the applicable law, article 1210(2) of the Russian Code provides:

> "An agreement of parties as to the selection of law to be applicable shall be expressly stated or shall clearly ensue from the terms and conditions of the contract or the complex of circumstances of the case."

Therefore, the parties may exercise their choice by expressly stating the law applicable to their contract. In the absence of an express choice of law, a choice may be inferred by the court from the terms and conditions of the contract or the circumstances of the case. In terms of article 1210(2), the court can infer a tacit choice of law only if that law *clearly ensues* from the terms or circumstances of the case. Therefore, a high threshold for the determination of a tacit choice of law exists.

The law chosen by parties governs the emergence of ownership and property rights (to movable property), flowing from the contract.[56] The governing law is also applied to determine the construction of the contract,[57] rights and responsibilities of the parties to the contract,[58] performance of the contract,[59] the effects of failure to perform or improper performance,[60] termination of the contract[61] and consequences of its invalidity.[62]

It appears that the parties have a wide discretion in choosing a legal system to govern their agreement. However, this freedom is not unfettered. The law chosen by the parties will be limited by public policy or mandatory norms of the Russian Federation or another country closely connected to the contract.[63]

[54] See article 1210(4).
[55] Vorobieva (n 42) 82 and Orlov (n 52) 93.
[56] See article 1210(1); Lebedev et al (n 47) 132; and Vorobieva (n 42) 83.
[57] Article 1215(1).
[58] Article 1215(2).
[59] Article 1215(3).
[60] Article 1215(4).
[61] Article 1215(5).
[62] Article 1215(6).
[63] See, generally, articles 1192 and 1193.

3.3 *Applicable Law in the Absence of Choice*

In the absence of a choice of law, it is left to the court to determine the applicable law.[64] Article 1211 of the Russian Civil Code provides the following:

> "(1) Where there is no agreement of parties on applicable law, the contract shall be subject to the law of the country with which the contract has the closest relation. (2) The law of the country with which a contract has the closest relation shall be deemed the law of the country where the party responsible for the performance under the contract of crucial significance for the content of the contract has its place of residence or main place of business, except as otherwise ensuing from the law, the terms or substance of the contract or the group of circumstances of the case in question."

Under Russian law, the applicable law in the absence of a choice of law by the parties shall be the law of the country, with which the contract has its closest connection. In terms of article 1211(2), a contract is deemed most closely connected to the country where the party responsible for the performance of the obligation which is of crucial importance to the content of the contract, is resident or has their principal place of business (unless a statute, the terms/substance of the contract or circumstances of the case require a different result).[65] Therefore, under Russian law, the law applicable in the absence of choice is the law of the country where the party whose performance is characteristic of the contract or is of crucial importance to the content of the contract resides or has their main place of activity.[66]

4. CHOICE OF LAW IN INDIA

4.1 *Introduction*

As a former colony of the British, the Indian legal system is inherited from the English common law.[67] Although India is no longer bound to follow English precedent, neither its legislature nor judiciary has exhibited any signs of abandoning the common law doctrines and developing a new system of Indian private international law.[68] At present, India has no statutory law

[64] Vorobieva (n 42) 83 and Badykov "The Russian Civil Code and the Rome Convention: applicable law in the absence of choice by the parties" 2005 *Journal of Private International Law* 1 269.
[65] Vorobieva (n 42) 83-84.
[66] See, also, Lebedev et al (n 47) 133-134; Orlov (n 52) 93-94 and Vorobieva (n 42) 84.
[67] See Neels "The role of the Hague principles on choice of law in international commercial contracts in Indian and South African private international law" 2017 *Uniform Law Review/Revue de droit uniforme* 443 444; Bouwers (n 4) 13.
[68] Govindaraj *Conflict of Laws in India* (2011) 10. See, also, Ramachandran "Conflict of Laws as to Contracts" 1970 *Journal of the Indian Law Institute* Vol. 12, 269 275.

governing its private international law and choice of law rules.[69] The content of Indian private international law (and its choice of law rules) remain influenced by the English common law.[70] As such, Indian courts apply the common law rules relating to the proper law of the contract.[71]

4.2 *Party Autonomy in India*

As abovementioned, there is no statute regulating private international law in India.[72] The principles governing party autonomy in the choice of law are derived from case law.[73] The English case of *Vita Food Products v Unus Shipping Company*[74] holds much sway in Indian private international law and is often relied upon by the Indian judiciary.[75] In *Vita Food Products*, Lord Wright, writing for the Privy Council noted:

> "[T]he proper law of the contract is the law which the parties intended to apply...[and if that intention is not expressed, it] will be presumed from the terms of the contract and the relevant surrounding circumstances…. Where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal [and not contrary to] public policy."[76]

At common law, the parties to a contract are allowed to choose the applicable law.[77] This principle has been reiterated and applied by Indian courts. For instance, in *Dhanrajmal Govindram v M/s Shamji Kalidas & Co*,[78] *British Indian Steam Navigation Co Ltd v Shanmughavilas Cashew Industries*[79] and *National Thermal Corporation v Singer Company*,[80] the courts' acknowledged the parties' ability to choose the law applicable to the contract. As such, the principle of party autonomy is well established in Indian in private international law.

It was previously unclear whether parties to a contract could choose a law that was unrelated to the parties or the contract.[81] In the case of *British India Steam Navigation Co Ltd v Shanmughavilas Cashew Industries*, the Supreme Court was of the view that the parties' choice

[69] Ramachandran (n 68) 270 and 275; Agrawal and Singh *Private International Law in India* (2010) 93 and Neels (n 67) 444.
[70] Agrawal and Singh (n 69) 93; Govindaraj (n 68) 10 and Khanderia "Indian private international law vis-à-vis party autonomy in the choice of law" 2018 *Oxford University Commonwealth Law Journal*, Vol. 18, 1 6.
[71] See Ramachandran (n 68) 75 and Khanderia (n 70) 6.
[72] See, also, Setalvad *Conflict of Laws* (2009) 674.
[73] Setalvad (n 72) 674.
[74] (1939) AC 277.
[75] Khanderia (n 70) 6.
[76] *Vita Food Products v Unus Shipping Company* (1939) AC 277 290.
[77] See, generally, Agrawal and Singh (n 69) 93-94; Govindaraj (n 68) 55 and *State Aided Bank of Travancore Ltd. V Dhrit Ram LR* 69 1A 1 AIR 1943 PC 6.
[78] AIR 1961 SC 1258 par 37 at (https://indiankanoon.org/doc/859839/ (2-10-2019)).
[79] (1990) 3 SCC 481 492.
[80] (1992) 3 SCC 551 562 par 19.
[81] See Neels (n 67) 445 and Khanderia (n 70) 7.

of law must have a nexus with the contract.[82] The court stated: "[I]t may not be permissible to choose a wholly unconnected law which is not otherwise a proper law of the contract".[83] Furthermore, it had "residual power to strike down for good reasons choice of law clause, which is totally unconnected to the contract".[84] In light of the precedential (binding) value of the Supreme Court's decision, lower courts were bound to restrict the parties' choice to a legal system that had a connection to the parties or contract in question.[85] However, in *National Thermal Corporation v Singer Company*,[86] the Supreme Court of India abandoned the restrictive approach, which required the parties to choose a law that bore a connection to the contract, in favour of the more liberal approach that gave parties the right to choose a legal system, regardless of any connection between the obligation and the chosen law.[87] The Supreme Court, in the more recent case of *Modi Entertainment Network and Another v WSG Cricket Pte Ltd*,[88] again reiterated the position that Indian private international law permits a choice of a legal system, regardless of any connection with the parties or the contract in question.[89]

The court in *National Thermal Power* stated that party autonomy in the choice of law also extends to the selection of different laws to govern different parts of the contract (i.e. *dépeçage*). The only caveat was that the parties' choice must be bona fide and not contrary to public policy.[90] However, an Indian court has not yet decided on whether the parties may choose non-State rules to govern their contract. As such, it is unclear whether non-State rules or other non-binding instruments such as the UNIDROIT Principles of International Commercial Contracts (UPICC) may be chosen by parties to govern their contract.[91]

The parties' choice of law may be made either expressly or tacitly.[92] Where the parties expressly choose the applicable law, such an express selection ought to be explicit, emphatic

[82] *British Indian Steam Navigation Co Ltd v Shanmughavilas Cashew Industries* (1990) 3 SCC 481 497. See, also, Agrawal and Singh (n 69) 93 and Khanderia (n 70) 7-8.
[83] *British Indian Steam Navigation Co Ltd v Shanmughavilas Cashew Industries* (1990) 3 SCC 481 497.
[84] *British Indian Steam Navigation Co Ltd v Shanmughavilas Cashew Industries* (1990) 3 SCC 481 497.
[85] See Khanderia (n 70) 8.
[86] (1992) 3 SCC 551 par 14.
[87] Khanderia (n 70) 8-9.
[88] [2003] 4 SCC 341.
[89] Khanderia (n 70) 9.
[90] *National Thermal Corporation v Singer Company* (1992) 3 SCC 551 par 14.
[91] Khanderia (n 70) 13.
[92] *Vita Food Products v Unus Shipping Company* (1939) AC 277 290; *Dhanrajmal Govindram v M/s Shamji Kalidas & Co AIR* (1961) SC 1258 par 37; *British Indian Steam Navigation Co Ltd v Shanmughavilas Cashew Industries* (1990) 3 SCC 481 492; *National Thermal Corporation v Singer Company* (1992) 3 SCC 551 par 15; *Delhi Cloth and General Mills Co v Harnam Singh* AIR 1955 SC 590; *Shreejee Traco(I) Pvt Ltd v Paperline International Inc* (2003) 4 SCC 341; Govindaraj (n 68) 56-57 and Setalvad (n 72) 305.

and unambiguous.[93] If a choice of law clause is fanciful, whimsical or meaningless, the court will likely disregard it and proceed to ascertain the proper law of the contract by inferring the intention of the parties.[94] In respect of a tacit choice of law, the Supreme Court of India in *National Thermal Power* stated that the parties' intention is to "be clearly inferred from the contract itself or its surrounding circumstances".[95] Therefore, the indicators of a tacit choice of law may be inferred by the provisions of the contract or the surrounding circumstances.[96] By the use of the phrase "clearly inferred", Indian private international law advocates a high threshold for the existence of a tacit choice of law.

The only limitations on party autonomy are that the parties' choice of law must be made bona fide and not contrary to public policy.[97] Thus, a choice of law clause, which contains provisions that are inconsistent with any mandatory Indian statutory provisions, will be struck down as being contrary to public policy.[98]

4.3 *Applicable Law in the Absence of Choice*

Previously, Indian courts applied presumptions in the absence of a choice of law by the parties. Firstly, the law of the place where the contract was made (the *lex loci contractus*) was preferred. However, where the contract was made in one country but performed in another, the (*lex loci solutionis*) approach was favoured.[99] These presumptions are no longer favoured. In the absence of a choice of law, an Indian court will apply the system of law that is most closely connected to the contract. In *National Thermal Power*, the Supreme Court iterated the use of the objective approach in determining the proper law of the contract by stating:

> "[T]he proper law is thus the law which the parties have expressly or impliedly chosen, or which is imputed to them by reason of closest and most intimate connection with the contract."[100]

As such, in the absence of a choice of law, the proper law will be the legal system with which the contract is most closely connected. This will be determined by objectively evaluating all

[93] Govindaraj (n 68) 56.
[94] Govindaraj (n 68) 57.
[95] *National Thermal Corporation v Singer Company* (1992) 3 SCC 551 par 13.
[96] Neels "Choice of forum and tacit choice of law: the Supreme Court of India and the Hague Principles on Choice of Law in International Commercial Contracts (an appeal for an inclusive comparative approach to private international law)" in UNIDROIT (ed) *Eppur si muove: The Age of Uniform Law. Essays in Honour of Michael Joachim Bonell to celebrate his 70th birthday* (2016) 358 367.
[97] See, also, Ramchandran (n 68) 276; and Khanderia (n 70) 12-13.
[98] See the Indian Contract Act 1872 sections 23, 27 and 28; *Kumarina Investment Ltd v Digital Media Convergence Ltd* [2010] TDSAT 73; Ramchandran (n 68) 276 and Khanderia (n 70) 12-13.
[99] Agrawal and Singh (n 69) 96.
[100] *National Thermal Corporation v Singer Company* (1992) 3 SCC 551 562 par 19.

the circumstances surrounding the contract, avoiding any presumptions as to the proper law of the contract.

5. CHOICE OF LAW IN CHINA

5.1 *Introduction*

In 1978, China embarked on an "opening-up policy", which resulted in the integration between China and the global market.[101] This development led to a need for more comprehensive rules on private international law. In subsequent years, China enacted various rules on private international law, including rules on choice of law.[102] In 2010, China enacted the Law on the Application of Law for Foreign-Related Civil Legal Relationships of the People's Republic of China (LAL).[103] As such, conflict rules that were previously scattered in different laws are now contained in a comprehensive enactment.[104] There are also judicial interpretations issued by the Supreme People's Court of China (SPC), which are binding on lower courts.[105] As such, the LAL should be read together with these judicial interpretations.

A unique feature of China is that it comprises distinct legal systems, namely mainland China, and the Special Administrative Regions (SAR) of Hong Kong and Macau.[106] This entails that Hong Kong and Macau have their own economic, legal and political regime, separate from mainland China. As such, both Hong Kong and Macau have their own private international law systems.[107] For the purpose of this study, only the choice of law rules in mainland China are discussed.

5.2 *Party Autonomy in China*

Article 41 of the LAL contains the most important provisions on choice of law. It states:

> "The parties may by agreement choose the law applicable to their contract. Absent any choice by the parties, the law of the habitual residence of a party whose performance of obligation is most

[101] Tu *Private International Law in China* (2016) 2 and Tang, Xiao and Huo *Conflicts of Laws in the People's Republic of China* (2016) 4.
[102] Tu (n 101) 2.
[103] Tu (n 101) 23.
[104] Tu (n 101) 23-25.
[105] See, generally, Tu (n 101) 4-6, 29-33 and 71-72 and Zhengxin *Private International Law in China* (2010) 181.
[106] See Zhengxin (n 105) 9; Tu (n 101) 9-10 and Zhu *Chinese Conflicts of Law: A Restatement and Legisprudence Proposal* (2018) 190-193.
[107] Tu (n 101) 10.

> characteristic of the contract or the law that is most closely connected with the contract shall be applied."

Article 41 clearly provides that parties are permitted to choose the law with which to govern their contract. Therefore, party autonomy is permitted under Chinese private international law. The LAL is silent on whether the law chosen by the parties ought to have a connection to the contract or the parties. However, article 7 of Interpretation (I) of the Supreme People's Court[108] provides the following:

> "Where a party claims that the choice of law is invalid on the grounds that the law agreed upon by the parties is not actually associated with the foreign-related civil relation at issue, the people's courts do not uphold the claim."

Given the binding effect of Interpretations issued by the SPC,[109] it appears that parties, in exercising their choice under article 41, are at liberty to choose an unconnected system of law. The LAL is also unclear on whether a non-State law may be chosen by the parties. Although ratified Conventions may be chosen in Chinese private international law, neither the LAL nor the Interpretations provide guidance on whether the *lex mercatoria* or non-State law can be directly chosen by parties as the applicable law.[110] Finally, on the matter of *dépeçage*, neither the LAL nor the SPC's interpretations explicitly admit it. It is therefore uncertain whether *dépeçage* will be permitted in Chinese private international law.

Article 41 of the LAL does not state the means by which parties may exercise their choice of law. However, article 3 of the LAL provides: "The parties may explicitly choose the law applicable to their foreign-related civil relation in accordance with the provisions of this law." Article 3 makes it clear that parties are allowed to make their choice by means of an express provision. However, there is some uncertainty in respect of a tacit choice of law. On the one hand, article 8 of the Interpretation (I) appears to permit a tacit choice of law. It provides:

> "Where the parties agree to choose or change the applicable law prior to the conclusion of oral arguments at the court of first instance, the people's court shall give the approval. Where both parties invoke the law of the same country and neither has raised any objection to it, the people's courts may determine that the parties have chosen the law applicable to the foreign-related civil relation."

[108] The Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships" (I) (http://cicc.court.gov.cn/html/1/219/199/201/679.html (2-9-2019)).
[109] See Tu (n 101) 4-6 and 29-33 for more detail on the status of the SPC and its documents in the Chinese legal system.
[110] Tu (n 101) 75.

This provision may be interpreted as an acceptance of an implied choice of law where such a choice is made by conduct.[111] Although this interpretation is not consistent with article 3 of the LAL, Chinese authors Tang, Xiao and Huo assert that an implied choice of law made in this manner is accepted by Chinese courts.[112] On the other hand, article 41 of LAL is silent in this regard, while article 3 provides only for express choices of law. On this basis, it may be argued that Chinese private international law does not accommodate a tacit/implied choice of law. Therefore, parties, in exercising their choice under article 41, must ensure that it is made clearly and expressly.

The parties' ability to exercise their choice of law may be limited by Chinese courts. In terms of article 4 of the LAL, a choice of law may be limited by mandatory provisions of China.[113] Furthermore, article 5 of the LAL provides that public policy considerations should also be taken into account.[114] Finally, article 10 of the LAL outlines six instances[115] in which Chinese law shall be directly applicable regardless of whether a foreign law is chosen.[116]

5.3 *Applicable Law in the Absence of Choice*

In terms of article 41 of LAL, in the absence of a choice of law by the parties, the applicable law shall be the law of the place where the party whose performance of the obligation which is most characteristic of the contract habitually resides or the law that is most closely connected with the contract. Article 41 thus contains two tests for ascertaining the applicable law in the absence of choice; namely "the characteristic performance" test and the "closest connection" test. It is suggested that this article is problematic, as it does not clearly state the order of preference in respect of the two tests.[117] As a result, there is uncertainty that exists in this regard.

[111] Tu (n 101) 76-77.
[112] Tang, Xiao and Huo (n 101) 212.
[113] Article 4: "Where a mandatory provision of the law of the People's Republic of China ("PRC") exists with respect to a foreign-related civil relation, that mandatory provision shall be applied directly."
[114] Article 5: "Where the application of a foreign law will be prejudicial to the social and public interest of the PRC, the PRC law shall be applied."
[115] (1) Where protection of the interests of workers is involved; (2) where safety of food and public health is involved; (3) where environmental safety is involved; (4) where financial safety, such as foreign exchange controls, is involved; (5) where anti-monopoly or anti-dumping are involved; or (6) other situations that should be recognized as mandatory provisions.
[116] Tu (n 101) 43.
[117] See Neels "Rome in the Far East" (unpublished lecture University of Amsterdam, University of British Columbia and the University of Johannesburg) (2011-2012) 6 and Bouwers (n 4) 19.

6. CHOICE OF LAW IN SOUTH AFRICA

6.1 *Introduction*

The South African legal system is a hybrid system, shaped by continental civil law, English common law and indigenous African (customary) law.[118] Its private international law is based on Roman-Dutch law but is strongly influenced by English law, especially in the law of contract.[119] South African law was influenced largely by early continental systems of private international law.[120] Many of its existing private international law rules originated during the era of medieval statutists of the twelfth century and the Roman-Dutch jurists of the seventeenth and eighteenth centuries.[121] In addition, much reliance is placed on nineteenth and early twentieth-century English case law. As a result of these influences, South African private international law is in many respects a blend of Roman-Dutch and English law.[122]

6.2 *Party Autonomy in South Africa*

South African private international law recognises the autonomy of the parties to a contract to choose the law with which to govern their contract.[123] For instance, in *Laconian Maritime Enterprises v Agromar Lineas Ltd*,[124] Booysen J stated:

> "[O]ur law recognizes party autonomy in respect of the proper law of a contract… . Thus where the parties have expressly or impliedly… agreed upon a governing law our Courts would give effect to the intention of the parties."[125]

However, the extent to which the parties are able to express their choice is uncertain, as there is no clear authority in South African private international law regarding the limitations of the contracting parties' freedom to choose an applicable legal system.[126] For instance, it is unclear whether the parties may choose an unconnected system of law to govern their contract.[127]

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[118] Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* (2014) 13.
[119] Forsyth *Private International Law the Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 17-19; Neels (n 67) 444.
[120] Schoeman, Roodt and Wethmar-Lemmer (n 118) 13.
[121] Schoeman, Roodt and Wethmar-Lemmer (n 118)13-14.
[122] Schoeman, Roodt and Wethmar-Lemmer (n 118) 14.
[123] See *Society of Lloyds v Price and Lee* 2006 JOL 17577 (SCA) 7; *Laconian Maritime Enterprise Ltd. v Agromar Lineas Ltd* 1986 (3) SA 509 at 525F-G; *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 (C) at 145 B; *Guggenheim v Rosenbaum* 2 1961 4 SA 21 (W) at 31Aand *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 at 185-186. See, also, Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2016) 59; Forsyth *Private International Law- The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) 321 and Schoeman, Roodt and Wethmar-Lemmer (n 118) 50.
[124] 1986 3 SA 509 (D).
[125] *Laconian Maritime Enterprise Ltd. v Agromar. Lineas Ltd* 1986 (3) SA 509 at525F.
[126] Van Nierkerk and Schulze (n 123) 59 and Schoeman, Roodt and Wethmar-Lemmer (n 118) 50.
[127] Schoeman, Roodt and Wethmar-Lemmer (n 118) 50.

However, leading South African authors are of the view that parties to a contract should be allowed to choose any legal system, even if it bears no connection to the contract or the parties.[128] It is also unclear whether a choice of a non-State law will be permitted in South African private international law.

In respect of whether *dépeçage* is permitted, Grosskopf J in *Improvair (Cape) (Pty) Ltd v Establissements Neu,*[129] remarked in obiter that parties to a contract may expressly agree to have their contract governed by more than one proper law.[130] Van Niekerk and Schulze also support the concept of *dépeçage*.[131] However, there has been no authoritative judicial pronouncement in this regard. As such, it is unclear whether *dépeçage* is permitted in South African private international law.

Parties may exercise their choice of law by expressly stating the law applicable to their contract.[132] Where the parties fail to expressly choose a governing law, a tacit choice may also be inferred by the court.[133] The provisions of the contract, as well as the circumstances surrounding the agreement, will be examined in order to ascertain whether a tacit choice of law exists.[134] However, there is very little guidance in South African law regarding the criterion for inferring a tacit choice of law.[135] The court in *Improvair* was of the view that a tacit choice of law "should not be readily implied".[136] Although it is not definitive, it is suggested that this indicates a strict threshold in the determination of a tacit choice of law.[137]

The parties' choice of law, whether expressly or tacitly made, may be limited on the grounds that it is prejudicial to public policy considerations or contrary to the mandatory rules of the forum.[138]

[128] Van Nierkerk and Schulze (n 123) 60; Forsyth (n 123) 320-321; Neels "The nature, objective and purposes of the Hague Principles on Choice of Law in International Contracts" (2013–14) 15 *Yearbook of Private International Law* 45 51–52 and Neels (n 67) 445.
[129] 1983 2 SA 138.
[130] *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 at 147 C.
[131] Van Niekerk and Schulze (n 123) 61.
[132] *Laconian Maritime Enterprise Ltd. v. Agromar. Lineas Ltd* 1986 (3) SA 509 at 525F. See, also, Schoeman, Roodt and Wethmar-Lemmer (n 118) 51.
[133] See *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 at 147 C and *Laconian Maritime Enterprise Ltd. v Agromar. Lineas Ltd* 1986 (3) SA 509 at 525F.
[134] See Forsyth (n 123) 327; Van Nierkerk (n 123) 61 and *Standard Bank of South Africa Ltd v Efroiken and* Newman 1924 AD 171 at 185.
[135] Bouwers "Tacit choice of law in international commercial contracts- the position in South African law and under the Rome I Regulation" (2017) 75.
[136]*Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 at 145 C.
[137] See Forsyth (n 123) 327; Van Nierkerk (n 123) 61 and Bouwers (n 135) 76.
[138] *Representatives of Lloyds v. Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA); Van Niekerk (n 123) 60 and Forsyth (n 123) 323.

6.3 *Applicable Law in the Absence of Choice*

Under South African private international law, there are two approaches that may be applied in determining the proper law; the subjective approach, as adopted in *Standard Bank v Efroiken*,[139] and the objective approach. In terms of the subjective approach, the court identifies, in the light of the surrounding circumstances and subject matter of the contract, what law the parties may be presumed to have intended to govern the contract.[140] However, it is suggested that applying a subjective approach where the parties lack an intention as to the governing law is incorrect.[141] Under the objective approach, the applicable law is the system of law with which the contract has the closest and most real connection.[142] Although South African courts have not yet departed from the subjective approach, the *obiter dicta* in the *Laconian*[143] and *Improvair*[144] cases expressed support for the use of an objective approach in determining the proper law of the contract in the absence of a choice of law. A South African court may perhaps adopt the objective approach should an opportunity present itself. Presently, the approach adopted in the *Standard Bank* case appears to be the orthodox view in South African private international law.

The factors that the court will consider in determining the proper law of the contract in the absence of a choice of law include, *inter alia*, the place of conclusion of the contract, the place of performance, the principal place of business and the domicile of the parties.[145] However, South African case law appears to place significant emphasis on the law of the place of performance, unless the circumstances indicate another legal system.[146] Thus, in the absence of other circumstances, the applicable law in the absence of choice is likely to be, the law of the place of performance.

[139] Schoeman, Roodt and Wethmar-Lemmer (n 118) 53; Bouwers (n 4) 23.
[140] *Representatives of Lloyds v. Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA); Van Niekerk (n 123) 60; Forsyth (n 123) 323.
[141] See Schoeman, Roodt and Wethmar-Lemmer (n 118) 54.
[142] Forsyth (n 119) 307-308.
[143] *Laconian Maritime Enterprise Ltd. v. Agromar. Lineas Ltd* 1986 (3) SA 509 at 526D-H and 530 I.
[144] *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 at 146H-147A.
[145] See Fredericks and Neels "The proper law of a documentary letter of credit" 2003 SA Merc LJ 63 67 and Schoeman, Roodt and Wethmar-Lemmer (n 118) 53 and 55.
[146] See *Standard Bank v Efroiken and Newman 1924 AD 171 at* 185-186; *Shacklock v Shacklock* 1948 2 SA 40 (W) at 51 and *Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W) at 31A.

7. COMPARISON AND CONCLUDING REMARKS

The BRICS countries belong to divergent legal families, which may be broadly categorised into common law and civil law systems. As a result, there exists dissimilarities in their private international law systems. This divergence is illustrated by the manner in which the various BRICS countries approach the choice of law in international commercial contracts. That being said, there are also certain aspects regarding choice of law where similarities can be found.

Apart from Brazil, the BRICS countries recognise and uphold the concept of party autonomy as far as the choice of law is concerned. The default position in Brazil is that the law of the place where the contract was constituted will govern international commercial contracts.

Although Russia, India, China and South Africa recognise party autonomy, the extent to which the principle is applied in these jurisdictions differ. Russia, India and China allow parties the freedom to choose any legal system, regardless of its connection to the transaction or the parties. However, there is no clear authority in South African private international law in this regard. Although South African academics advocate for permitting such a choice, the position remains uncertain. Both Russian and Indian private international law permits *dépeçage*. However, the position in China and South Africa is unsettled in this respect. All four jurisdictions fail to address the question of whether non-state law may be chosen by the parties to govern an international commercial contract.

Russian, Indian, Chinese and South African private international law allow the parties to express their choice of law by means of an express provision in the contract. Furthermore, these jurisdictions, with the exception of China, recognise the possibility of a tacit choice of law. Although Chinese authors advocate for a tacit choice of law, the current position is that Chinese law only permits an express choice of law. It appears that Russian, Indian and South African law establish a strict threshold in the determination of a tacit choice of law.

In the absence of a choice of law, Russia, India and China apply the law with which the contract is most closely connected i.e. the closest connection test. However, the position in South Africa is unclear at present and remains a matter of judicial discretion. The courts may apply either the law of the parties' presumed intentions or the law with which the contract has its closest and most real connection.

From the discussion above, it is clear that a fair amount of uncertainty exists in the BRICS countries with respect to their choice of law systems. In addition to this, there are also dissimilarities in their respective choice of law processes. The rejection of party autonomy in

Brazilian private international law should be addressed to allow contracting parties to choose a law to govern their agreement. Although Russian, Indian, Chinese and South African private international law recognises party autonomy, these jurisdictions need to clarify the extent to which parties may exercise their choice of law. In respect of the manner of choice, Chinese courts may consider allowing for an implied/tacit choice of law. This would further the principle of party autonomy in international commercial contract. In the absence of a choice of law, a South African court should clarify its position in favour of the objective approach i.e. the law of closest connection.

In consideration of the fact that the BRICS' objectives are attaining economic cooperation and strengthening business, trade and investment ties among their business communities, the BRICS countries should consider harmonizing their choice of law rules to promote certainty and predictability in international commercial contracts. This would further their objective of achieving greater cooperation in international commerce.

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